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IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH ERRANTE,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether Double Jeopardy and the Rules of Criminal Procedure forbid conviction for a lesser included offense of a charge dismissed for lack of evidence under Rule 29, Fed.R.Crim.P.?

2. Whether withdrawal should be a recognized defense to a conspiracy charge?

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Michael Pollack, on behalf of Petitioner, Joseph Errante, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on the 2nd day of December, 1982, affirming the judgment of conviction and sentence of the District Court.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 695 F.2d 45 (2d Cir. 1982), is appended to this Petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered December 2, 1982, and a copy thereof is appended to this Petition as Appendix B. An order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En banc* was entered January 11, 1983, and a copy thereof is appended to this Petition as Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes, Federal Rules and Regulations Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall...be subject for the same offense to be twice put in jeopardy of life or limb..."

Rule 29(a), Federal Rules of Criminal Procedure provides:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 31(c), Federal Rules of Criminal Procedure provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Statement of the Case

A. Introduction

On September 17, 1981, a two-count indictment was filed, charging Petitioner, co-defendant Vito LoRusso and "others to the Grand Jury unknown" with conspiring to distribute and possess with intent to distribute heroin (21 U.S.C. § 846), and possession with intent to distribute heroin (21 U.S.C. § 841). It was alleged that the defendants attempted to purchase a large quantity of narcotics from both a government informant and an undercover agent of the Drug Enforcement Administration ("DEA"). The proof at trial was adduced largely through the testimony of the informant and the undercover agent, and through various tape recordings made during these witnesses' negotiations with the defendants.

Petitioner denied conspiring to violate the narcotics laws, least of all with his co-defendant, with whom he had constant, emotional disagreements. He urged as well that he had withdrawn from any negotiations prior to the formation of the alleged criminal conspiracy.

B. The Trial Testimony

Co-defendant LoRusso was first introduced to DEA agent John Costanzo by informant "Mimmo" when the three dined at LoRusso's restaurant in the Little Italy section of New York in September of 1980. Four months later Mimmo called LoRusso from Milan, Italy, and LoRusso said a friend wanted to purchase a large quantity of heroin.

On January 24, 1981, after certain preliminary, nonconsequential telephone conversations, LoRusso and Petitioner flew to Milan. They were met by Mimmo and Costanzo at the airport, and introductions were made over lunch. Petitioner allegedly said he was authorized to purchase heroin for certain persons in New York who wanted to begin distributing heroin. Certain details were discussed.

Later the same day the four met again, and Errante said he was authorized to pay in advance for 10 kilograms of heroin. The parties agreed that the purchasers would pay the prevailing New York market price at time of delivery. Petitioner then said he would return to New York and asked LoRusso to phone him on January 28. Apparently this was done, for on January 28 LoRusso phoned Mimmo and reported that Errante's family had approved the deal.

After certain initial difficulties, the four met in New York on February 7 and a price of $120,000 per kilo for ten kilos was proposed by Costanzo. At the time, however, LoRusso accused Petitioner of being a policeman and the meeting was aborted. However, another meeting was held the following day. Petitioner said the price was agreeable but that "his people" wanted to purchase only one kilo. Costanzo suggested a compromise of five kilos. Although no agreement was reached, the method of delivery was discussed. Nevertheless, LoRusso kept questioning Petitioner's bona fides.

At 4:00 p.m. on February 9, Costanzo and Errante met at LoRusso's restaurant and agreed to a one kilogram heroin sale for $120,000. But when Costanzo informed LoRusso of the arrangements, the latter reiterated his distrust of Errante. Both Costanzo and Mimmo then angrily told LoRusso they wanted nothing further to do with him. LoRusso, however, later told Mimmo that his fears of Errante had subsided, and it was agreed that LoRusso could be present when a sample was to be delivered the next day.

On February 10, a three gram sample was given to Errante for testing. The sample proved satisfactory and it was therefore agreed that the sale could go forward.

The deal, however, was never consummated. Costanzo balked when Errante demanded that the heroin be delivered before payment, and subsequent attempts to exhume the deal failed. When Mimmo later told LoRusso that Costanzo was now willing to accept

Errante's terms, LoRusso replied that Errante wanted nothing more to do with either Mimmo or Costanzo and that he had told LoRusso to "tear everything."

C. The Motion to Dismiss

After the government rested, the defense moved pursuant to Rule 29, Fed. R. Crim. P., to dismiss each count of the indictment. As to Count One, counsel urged that Petitioner's withdrawal from, and frustration of the conspiracy constituted a complete defense thereto. The district court disagreed. As to Count Two counsel urged that the evidence was insufficient to prove the defendants intended to distribute the sample which had been provided to Errante for testing. After a comprehensive review of the pertinent evidence the court found the government's evidence to be entirely speculative, and dismissed Count Two.

Following this dismissal the government, for the first time, requested pursuant to Rule 31(c), Fed. R. Crim. P., that the court submit to the jury the lesser included offense of simple possession of a controlled substance (21 U.S.C. § 844). The court agreed, and Petitioner was convicted of both counts.

D. The Opinion of the Court of Appeals

On December 2, 1982, the Second Circuit Court of Appeals affirmed the District Court's judgment of conviction and sentence with respect to both the Petitioner and his co-defendant, Vito LoRusso.

In so ruling, the court rejected Petitioner's arguments in their entirety, including his assertion that the Double Jeopardy Clause and the Federal Rules of Criminal Procedure prohibited the trial court from submitting the lesser-included offense under Count Two to the jury.

The Federal Rules were not violated, said the Court of Appeals, because the submission of the lesser offense constituted a permissible modification of the district

court's oral, interlocutory order dismissing Count Two. (12a). The Double Jeopardy Clause was not violated, the Second Circuit held, since the oral judgment of dismissal had not yet been entered nor had the jury been discharged (15a).

The circuit court also rejected Petitioner's assertion that the defense of withdrawal had been established as to Count One, conspiracy. The court explained that withdrawal had never been recognized in the Second Circuit "as a defense to a conspiracy count directed at the period prior to withdrawal" and that, in any event, Petitioner's actions had not manifested a "complete and voluntary renunciation" of the criminal purpose. (16a-17a n.5).

Reasons for Granting the Writ

Point I

Double Jeopardy and the Rules of Criminal Procedure Forbid Conviction for a Lesser-Included Offense of a Charge Dismissed for Lack of Evidence Under Rule 29, Fed. R. Crim. P.

The subtle yet critical—interplay between double jeopardy protections and pre-verdict dismissals under Rule 29, Fed. R. Crim. P. has not previously been explored by this Court. Yet the need for such exploration is underscored by the events which occurred in the trial court. A serious charge was dismissed under Rule 29 for want of evidence. Then, for the first time, the government asked the court to instruct the jury concerning a lesser-included offense under the count which had been dismissed. The court complied and the defendant was convicted.

The Second Circuit found this procedure permissible because the district court had only exercised its inherent power to "amend" or "modify" its "oral" "interlocutory" order of dismissal, and because this procedure did not occasion a second trial in violation of double jeopardy.

The circuit court's opinion, however, views far too narrowly the scope of double jeopardy protection and misconstrues the nature and effect of an order granting a Rule 29 dismissal. Moreover, the circuit court failed to consider with appropriate circumspection the machinations of the government which resulted in this procedural and constitutional morass.

A. This Court Should Definitively Rule that a Pre-Verdict Order Dismissing a Charge for Lack of Evidence Pursuant to Rule 29, Fed. R. Crim. P., is Not Subject to Reconsideration or Amendment

Rule 29, Fed. R. Crim. P., abolishes "motions for a directed verdict" and empowers the court to enter a "judgment of acquittal" where the evidence is insufficient to sustain conviction. The change in nomenclature was to "accord with the realities," *see* Advisory Committee Notes to Rule 29, and, indeed, an order entered pursuant to Rule 29 is equivalent to a jury verdict of acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977).

This being so, amendments or modifications of Rule 29 orders should be subject to the same limitations as are jury verdicts of acquittal, which may be altered prior to their official "entry" only if published erroneously, as by either a slip of the tongue or the use of an incorrect verdict form. *E.g., United States v. Mears*, 614 F.2d 1175 (8th Cir.), *cert. denied*, 446 U.S. 949 (1980); *Brown v. Gunter*, 562 F.2d 122 (1st Cir. 1977). Certainly, an oral jury verdict—even though not officially entered—may not be re-opened simply to permit further deliberations. *Cf. Brown v. Gunter*, 562 F.2d at 125, *supra* ("the trial judge...had determined...that the changed verdict was not the result of renewed deliberations.").

The absolute finality of an acquittal, be it by a judge, announced prior to a jury verdict, or by the jury itself following deliberations, categorically distinguishes it from most other orders, which are subject to substantive reconsideration pursuant to the trial court's

inherent authority to correct its errors. *See Opinion of the Circuit Court* at 12a.[1] The circuit court's contrary ruling destroys the essential identity between a pre-verdict Rule 29 order of acquittal and a jury's verdict of acquittal, so carefully crafted by this Court.

B. The Submission of the "Lesser" Offense Reflected the Improper Addition of an Entirely New Charge, Rather than a Modification or Amendment of a Previous Ruling

When the defendants invoked Rule 29 to urge a dismissal of Count Two, the government made a transparently tactical decision not to request the addition of a lesser-included offense prior to the court's ruling, obviously not wanting to encourage a "compromise" order by his Honor. Then, its gambit having failed, the government for the first time requested the submission of the "lesser" offense.

Yet the government's request cannot properly be viewed as a motion to "reargue" or "modify" a previous order, as the circuit court found, since such a motion must be based on points of law assertedly "overlooked" or "misapplied" by the court. *See, e.g.,* Rule 41, Fed. R. Evid. There was no assertion that the district judge "overlooked" or "misapplied" anything, since the government had not previously requested that a lesser-included offense be charged.

In reality, then, the government sought and obtained the belated addition of an entirely new charge, a manifestly improper course. This new offense was, to be sure, necessarily included in the dismissed count, but it was added subsequent to the order of dismissal and not as a result of what may fairly be characterized as a modification or an amendment thereof.

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[1] Of course, the government could appeal a post-verdict order of acquittal under Rule 29 if not violative of double jeopardy. *See* 18 U.S.C. § 3731; *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The government ought not be permitted to flout or manipulate the rules of procedure, let alone the court and the other litigants. Undoubtedly the use of similar tacks by the defendants would have been viewed as a waiver of the tardily pursued theory. The rules of procedure, promulgated by this Court, should be enforced evenly. The government's ploys should not be countenanced, and the plain import and effect of the rules should be upheld.

C. The Submission of the Lesser-Included Offense Violated Double Jeopardy

This Court has on numerous occasions considered the parameters of the double jeopardy protection. As the circuit court noted, the Double Jeopardy Clause provides three fundamental protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.

13a, *quoting United States v. Wilson*, 420 U.S. 332, 343 (1975), *quoting in turn North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

It would, however, elevate form over substance to require, as a *sine qua non* of a valid double jeopardy claim, a second full-blown trial before an entirely different jury. For instance, a claim of jeopardy would certainly have been meritorious had Petitioner's jury actually been discharged after the granting of the Rule 29 motion, then brought back the next day to deliberate on a lesser offense after the court had a change of heart.

Yet the hypothesized scenario is substantially identical to what actually occurred. The jury physically remained in the courtroom, because another count of the

indictment survived, but it has long been the rule that "[e]ach count in an indictment is regarded as if it were a separate indictment," *Dunn v. United States*, 284 U.S. 390, 393 (1932), and the jury should therefore be considered to have been discharged as to Count Two immediately upon that count's dismissal. In exhuming the dismissed count, a completely new trial was not required, but only because the jury, in effect, adopted all the evidence previously submitted to it.[2]

Moreover, the court's ruling occasioned additional proceedings regarding the dismissed count, including closing argument, jury instructions and deliberations. If the risk of a complete re-trial were a requisite to a valid assertion of double jeopardy the "attachment" of jeopardy at the very commencement of trial—when the jury is first impanelled and sworn (*see Serfass v. United States*, 420 U.S. 377, 388 (1975))—would appear excessively harsh and unnecessary.

"The crucial question," said this Court in *Lee v. United States*, 432 U.S. 23, 30 (1977), "is whether the order contemplated an end to all prosecution of the defendant for the offense charged." *See also United States v. Scott*, 437 U.S. 82, 97 (1978). Certainly an order of dismissal under Rule 29 contemplates just that. *Cf. In re Dowling*, No. 48280-2, 32 Crim.L.Reptr. 2344 (Wash. Jan. 6, 1983) (en banc) (Double jeopardy violated by trial court's reconsideration of finding that State failed to rebutt presumption of eleven year old defendant's incapacity).

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[2] The opinion, as written, would also support results in other cases which, quite clearly, would be improper. For example, since the granting of a Rule 29 motion is no less an acquittal than is a jury verdict of not guilty, (*See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977)), the circuit court's decision would present no constitutional impediment to the government requesting—and obtaining—an instruction on a lesser-included offense after a jury has returned a verdict of not guilty, so long as the judgment of acquittal had not been "entered" and the jury had not been discharged. Similarly, if the panel's reasoning were correct, the government may, after a finding of not guilty by the court at a bench trial, request for the first time consideration of a lesser offense. Yet both of these scenarios would appear improper under double jeopardy principles and procedural law.

Point II

Withdrawal Should Be Recognized as a Defense to a Conspiracy Charge

Despite Petitioner's withdrawal from the drug conspiracy and his thwarting of its purpose, the district court refused to consider whether a defense to Count One had thereby been established. As the Second Circuit accurately observed, withdrawal simply has not heretofore been recognized by that court as a defense to a conspiracy charge (16a n.5). We respectfully urge this Court to now rule that withdrawal is, indeed, a valid defense, and to reverse Petitioner's conviction under Count One.

A defendant's withdrawal from a conspiracy has long been deemed relevant to the epplication of the statute of limitations and to the defendant's liability for subsequent, substantive offenses by co-conspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). Traditionally, however, once a defendant has entered into a conspiracy, guilt for that offense is not obviated by withdrawal. W. LeFave & A. Scott, *Criminal Law* 486 (1972).

This restrictive view is changing. *Id.* The Model Penal Code, for instance, provides an affirmative defense to a conspiracy charge when "after conspiring to commit a crime, [the defendant] thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Section 5.03(6) [Tent. Draft No. 10, 1960]. Additionally, each of the proposed revisions to the federal criminal code has recognized the defense of withdrawal. Thus, the original report of the Brown Commission, published in 1971, proposed:

> In a prosecution under section 1003 or 1004 [conspiracy] it is an affirmative defense that, under circumstances manifesting a complete renunciation of his criminal intent, the defendant prevented the commission of the crime or crimes contemplated by the conspiracy, as the case may be.

Final Report of the National Commission on Reform of Federal Criminal Laws (Brown Commission) § 1005. Subsequent revisions have adopted this approach. *E.g.*, Criminal Justice Reform Act of 1975 (S.1), 94th Cong., 1st Sess., § 1002(c); Criminal Code Reform Act of 1977 (S.1437), 95th Cong., 1st Sess., § 1002(b).

Several of the commentators also have urged reform similar to those proposed by the Model Code and Senate bills. *See, e.g.*, W. LeFave & A. Scott, *supra* at 487; "Developments in the Law — Criminal Conspiracy," 72 Harv.L.Rev. 920, 958 (1959); Rotenberg, "Withdrawal as a Defense to Relational Crimes," 1962 Wis.L.Rev. 596, 605. As LeFave & Scott notes, the defense, as recognized in the Model Code and elsewhere is sound, based as it is on

> ...two most sensible propositions: (1) the act of agreement is not of itself sufficiently undesirable and indicative of the defendant's dangerousness to warrant punishment in spite of the subsequent withdrawal; and (2) it is proper to require a thwarting of the conspiracy because the objective of a conspiracy will generally be pursued in spite of renunciation by one conspirator.

LeFave & Scott, *supra* at 487-88. Moreover, the availability of the defense may serve as an inducement to conspirators to withdraw and prevent the occurrence of contemplated crimes.

Here, counsel's attempts to proffer the withdrawal defense failed because of prevailing Second Circuit law. This law, however, is unsound and, further, is counterproductive to the fair and efficient administration of justice. As such it should be abandoned for the more enlightened approach of the Model Code and other cited authorities.

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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10 February, 1983

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